curities Exchange Act. See, *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512; *Remar* v. *Clayton Securities Corporation*, 81 F. Supp. 1014. It remains only to analyze the Power Act to find whether it gave to the Power Commission authority to determine the reasonableness of past rates and charges, and thus withdraws that question from judicial cognizance.

There are two pertinent sections in the Power Act. Under Sec. 824e the Commission, on its own motion or on complaint, may find that an existing rate is unjust or unreasonable, may fix just rates "to be thereafter observed and in force and shall fix the same by order." Section 824d(e) (pp. 7-8 above) provides that when a new schedule is filed the Commission on its own motion or on complaint may at once have a hearing as to the lawfulness of the proposed rates, and pending the hearing and decision thereon may suspend the operation of such schedule and "defer" the use of such rate, but not for a longer period than five months. If a decision is not reached by the expiration of five months, the proposed rates shall take effect, and when a decision is reached the Commission may order a refund if it finds the scheduled rates are not justified.

Section 824d(d) (p. 6 above) prevents a new schedule from taking effect until it has been on file thirty days. Thus, one section relating to rates that have been in effect and when complaint is not made until after the rates have become effective, limits the Commission to fixing new rates for the future, and the other section relating to an attack on a new schedule is intended to provide a means for preventing a new schedule from taking effect. The limited power to require refunds in Sec. 824d(e) is only applicable when a complaint against a new schedule is filed

and is only operative in cases where the new schedule takes effect pending the decision of the complaint against it.

The only authority to order refunds or reparation is found in Section 824d(e), and is only applicable under the conditions there provided. That is not the whole story.

Subchapter II of the Federal Power Act, effective August 26, 1935, which contains the sections we are now considering, originated from two bills, H. R. 5423 and S. 1725, identical in terms, both introduced February 6, 1935. S. 2796 was afterwards substituted in the Senate for S. 1725. The two original bills each contained the following:

> "Sec. 213. (a) When complaint has been made to the Commission concerning any rate or charge for any service performed by any public utility, and the Commission has found after investigation that the public utility has charged an unreasonable, excessive, or discriminatory amount for such service in violation of any provision of this title, the Commission may order that the public utility make due reparation to the complainant thereunder, with interest from the date of collection. No such order shall be issued unless the complaint is filed with the Commission within two years from the date of the payment.
>
> "(b) If the public utility does not comply with the order for the payment of reparation within the time specified within such order, action may be begun in any court of competent jurisdiction to recover the same within one year from the date of the order, and not thereafter."

Those sections were stricken from the bill by the Senate Committee on Interstate Commerce.

Senate Report 621, accompanying S. 2796, under the caption "Material Differences between Title II of S. 2796 and Title II of S. 1725" on page 20 states:

> "The provisions defining with particularity the power of the Commission to investigate single rates and to fix standards of service (former secs. 208 (b) and 210) and the section authorizing the issuance of reparation orders (former sec. 213) have been eliminated. They are appropriate sections for a State utility law, but the committee does not consider them applicable to one governing merely wholesale transactions."

The only provision in the act under which the Commission may make findings of fact "in aid" of any other tribunal is in Section 824e(b) under which the Commission, if so disposed, may make findings to aid a state commission, limited to cost of production or transmission of electric energy, only two factors in rate fixing.

By familiar rules of construction, the express grant to the Commission by Section 824e(b) of power to make limited findings as an aid to State commissioners, excludes any authority to make findings in aid of the courts.

The conclusion must be that the Power Commission has no power to grant reparations or to make any findings as to reasonable past rates as an aid to any court, and is without "primary" or indeed any jurisdiction of that subject, which could diminish the jurisdiction vested by general statutes in the United States District Courts.

II.

There is no basis here for applying the rule that administrative remedies must be exhausted before resorting to the courts.

The rule about first exhausting administrative remedies has been developed judicially to maintain proper balance between administrative tribunals and courts.

The Court below has not pointed out any method by which petitioner or its predecessor corporations could have obtained relief from the Power Commission. The reasons given by the Senate Committee for striking from the bill of the Power Act all provisions for examining past rates and ordering reparations are not illuminating. We may surmise that the committee thought that as the bill dealt only with wholesale transactions and only large corporations were to be affected, the provision for prompt objection to new schedules of rates and for preventing their taking effect would give such organizations ample protection so that resort to the reparation method would not be needed.

But here, the complaint charged and the Trial Court found that from 1935 to 1945 the petitioner's predecessors were subject to the complete domination of the respondent. The domination which enabled the respondent to exact unfair contracts, enabled it to prevent resort to the Commission to disapprove them before they took effect.

If a corporation, subjected to unfair rates, is a free agent and as such refrains from taking prompt

steps to have the Commission prevent unfair rates from taking effect, it might well be that such conduct constitutes a waiver of that administrative remedy, and leaves the corporation affected only the right to apply to the Commission to establish new rates for the future. See, *Mississippi Power and Light Co.* v. *Memphis Natural Gas Co.*, 162 F. (2d) 388. It should not be open to the respondent to assert that the petitioner or its predecessor corporations had not exhausted their administrative remedies, when resort to the Power Commission was made impossible by the respondent's domination and control. As for the petitioner, the only administrative remedy open to it was to apply to the Commission to fix reasonable rates for the future, and it promptly did so, and as a result the respondent agreed to new rates satisfactory to the petitioner, which relieved the Commission from the necessity of hearing the application which it dismissed as moot (R., Vol. V, p. 1876). When that application was made it was clear that the Commission had no power to order reparations.

As to the Commission's power to making findings as to reasonableness of past rates "in aid" of other tribunals, there was only Section 824e(b) giving the Commission permission to make limited findings in aid of State commissions. There was and is in the act nothing vesting in the Commission power to make findings as to past charges in aid of any court, either in anticipation of court action, or after an action is commenced.

III.

The opinion of the Court below.

With due respect for the learned Court below, its opinion must be characterized as inadequate.

The opinion, referring to the rates charged, states "they were all approved as filed by the Commission." No rate involved here was ever approved by the Commission. The Commission never considered or had a hearing as to the reasonableness of any of the rates.

The mere acceptance of a schedule is not an approval. The only action the Commission ever took was to make some orders allowing schedules (in the form of contracts) to take effect as of a date some months previous to filing, and in one it said:

> "Nothing contained in this order shall be construed as constituting approval by this Commission of any service, rate, provision, or condition contained in the contract referred to herein" (R., Vol. I, p. 111).

In the Court below the petitioner was confronted with an argument that under the law the petitioner was conclusively bound by the filed rates, and could not attack them or question their reasonableness. Many cases were cited arising under the Interstate Commerce Act and other regulatory statutes that where a rate schedule has been duly filed and has taken effect, the utility must collect and the shipper or customer must pay the scheduled rates. That is to prevent discrimination and rebating. Those cases do not hold that such rates are conclusively reasonable and

unimpeachable, but merely that they must be collected and paid in the first instance, subject to correction or reparation by the tribunals having jurisdiction of such claims. The Power Commission itself said in *Cleveland and Akron* v. *Hope Natural Gas Co.*, 44 P. U. R. (N. S.) 1, 33:

> "The acceptance of a rate for filing does not mean that the Commission approves it and does not establish the justness or reasonableness of the rate. *Re Home Gas Co.*, 39 P. U. R. (N. S.) 102, 109."

Section 824d(a) of the Power Act states that all rates and charges "made, demanded or received" shall be reasonable and "any such rate or charge that is not just and reasonable is hereby declared to be unlawful." That applies to rates filed. The filed rate must be collected and paid in the first instance, but is subject to impeachment in a proceeding brought for that purpose. The opinion below states (R., Vol. VI, p. 1992):

> "Nowhere does the Act give the district court power to determine just and reasonable rates."

The question is not whether the Act confers jurisdiction on the District Courts, but whether it gives jurisdiction to the Commission to exercise primary or exclusive jurisdiction over the question of reasonableness of past rates, and thus deprives the courts of power to try and decide the issue of reasonableness.

The opinion proceeds:

> "That power is given to the Commission exclusively."

The Court below completely ignores the sections of the Power Act which we have discussed above, to wit, Section 824e(a) which limits the Commission, after rates have taken effect, to fixing rates to be thereafter observed and in force, and Section 824d(e) that where a new schedule is filed the Commission may prevent its taking effect. No mention was made of Section 824e(b), the only authority for making findings "in aid" of other tribunals and which is limited to aiding State commissions, not courts, and which permits the Commission to make findings *only* as to cost of production or transmission.

Nor does the opinion even refer to the fact that a provision in the bill allowing the Commission to examine past charges as to reasonableness and order reparations was stricken from the bill before its passage.

The opinion then asserts that "the plan or scheme of the Federal Power Act is analogous to that of the Interstate Commerce Act" and then cites a long list of cases under the Interstate Commerce Act to the effect that "the reasonableness of (railway) rates will not be considered by the courts before application has been made to the Commission." That assertion was made notwithstanding the Interstate Commerce Commission has express authority to examine into past rates and make reparation orders—a power deliberately withheld from the Power Commission—and has been given authority to make findings "in aid" even of the Railway Mediation Board, and differs radically from the Power Act.

In support of the assertion that "jurisdiction in such a controversy as this to investigate fraud practiced by an electric public utility in the past as well as in the present is vested not in the district court

but in the Commission" the opinion below cites § 307 (16 U. S. C., 825f) relating to general investigative powers.

That position produces the astonishing result that, although the Commission has no power to grant reparations, it has jurisdiction to consider the issue of fraud exercised through corporate domination, which issue is preeminently a judicial one, and which the Commission is not specially qualified to deal with. The opinion fails to point out what use the Commission could make of a finding on fraud, in the absence of power to order reparations.

Finally, the opinion invokes the rule that no one is entitled to judicial relief "until the prescribed administrative remedy has been exhausted", ignoring the fact that the Commission is limited to fixing rates for the future or preventing a new schedule of rates from taking effect, and that the latter remedy was lost in this case because of the corporate control and domination which lasted until the time for applying for preventive relief was long past.

The Court below does not even mention the opinion in the Fourth Circuit in *Hope Natural Gas Co.* v. *Federal Power Commission,* 134 F. (2d) 287, although that case was cited in the briefs. The Natural Gas Act and the Federal Power Act are identical in their provisions about the power of the Commission, except that one relates to natural gas and the other to electricity, and any decision under one is an authority under the other. The opinion in the Fourth Circuit (pp. 309-311) analyzed the provisions of the Gas Act. In that case the Commission fixed wholesale gas rates to become effective in the future and "as an aid to state regulation", proceeded to find that wholesale

rates charged by Hope to the East Ohio Gas Company for a past period of three years were "unreasonably high". Its findings were not limited to cost of production or transmission as the statute provides, but fixed the final delivery price in dollars and the amount of excess charges for each of the past three years. The power of the Commission to do that was challenged in the Court of Appeals and there held to be wanting (p. 310). It said:

> "The Natural Gas Act shows clearly that it was the intention of Congress to give the Commission quasi-legislative power, *i. e.* regulatory power as to future rates; but there is no indication of any intention to clothe it with judicial or quasi-judicial powers with respect to past charges or practices, such as was vested in the Interstate Commerce Commission by section 9 of the Interstate Commerce Act, 49 U. S. C. A. § 9. As the Commission itself says, it was not given authority to fix rates for the past or to award reparations on account of past rates. If it was not given the power to fix past rates, or award reparations based upon their unreasonableness, it certainly was given no power to do the same thing indirectly by making findings of fact as to past rates to be given effect in rate proceedings before state commissions. No intention on the part of Congress to vest any such unusual power in a commission ought to be indulged unless conferred in the plainest terms; and not only is it not plainly given here, but such power cannot be spelled out of the statutes on any theory of interpretation with which we are familiar."

In the case at bar a question is whether the Commission, being without power to grant reparations, nevertheless has power to make findings as to past rates "in aid" of a District Court, and exclusive power to deal with that issue. Whatever may be said about findings "in aid" of a State commission, there is no shadow of power in the Commission to make findings as to reasonableness of past rates as a basis for judicial action.

The *Hope* case reached this Court and was reversed on other points, but the question as to the extent of the Commission's power to make findings as an "aid" to State commissions was not decided as there had been no "order" by the Commission on that subject, and the review of Commission acts by direct appeal from it to a Court of Appeals, as in that case, only is available to review an "order". What the Commission said in the *Hope* case, and what this Court said are set forth in the appendix to this brief.

IV.

Where there is a right, there should be a remedy.

If the decision in the Court of Appeals is affirmed, the petitioner is left without a remedy. The corporate domination by respondent forestalled any move to prevent the rates taking effect, or any early move to obtain just rates for the future.

There was no remedy available before the Commission, and if the District Court was powerless to act, there is no other place to obtain relief.

In a long line of cases this Court has always held that where there is a right, there should be a remedy. See, *Texas & Pacific Railway Co.* v. *Rigsby*, 241 U. S. 33.

The Power Commission has no reason to complain of our position. We are not attacking the generally accepted principle that an administrative commission is an appropriate tribunal to exercise primary jurisdiction as to the reasonableness of past rates. We did not apply to the Commission for findings as to past charges, for the simple reason that the Federal Power Act does not permit it. If the Commission wants such authority, it should apply to the Congress for it instead of asking this Court to disregard what seems to be the clear effect of the present statute.

The judgment of the Court of Appeals should be reversed and the case remanded to that Court for consideration of the merits.

Respectfully submitted,

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APPENDIX.

Cleveland and Akron v. *Hope Natural Gas Co.*, 44 Pub. Utilities Rep. (New Series), pp. 34-35:

"* * * Originally the city of Cleveland requested this Commission to find the lawful Hope-East Ohio rates since June 21, 1938, but it now represents that the subject is idle for rates prior to June 30, 1939, because those rates which Cleveland consumers were obligated to pay East Ohio have been settled. The Commission does not have the authority to fix rates for the past and to award reparations. But Congress did empower and instruct the Commission in § 5(a) of the Natural Gas Act, 15 USCA § 717d(a), to fix future rates, and as a step in that process we must necessarily consider the reasonableness of past and existing rates. When the issue is raised and the public interest will be served, we consider as a necessary part of that duty the power to examine the entire rate problem involved and to determine what rates were lawful in the past. Also, § 14(a) of the act, 15 USCA § 717m(a), authorizes the Commission to investigate any facts which it finds necessary in order to determine whether Hope has violated any provision of the Natural Gas Act. Furthermore, the Commission has power to perform any act, pursuant to § 16, 15 USCA § 717o, which is necessary or appropriate to carry out the provisions of the act. Under § 4(a) of the Act, 15 USCA § 717c(a), any interstate wholesale rate that is not just and reasonable is unlawful. *Federal Power Commission* v. *Natural Gas Pipeline Co. supra* [(1942) 315 U. S. 575, 86 L ed , 42 PUR(NS) 129, 62 S Ct 736] Hope's rate collected from East Ohio Gas Company was lawful after June 21, 1938, the effective date of the act, only to the extent that it was just and reasonable. The city of Cleveland states that the Ohio Commission is investigating the reason-

ableness of the East Ohio Gas Company's bonded retail rates in Cleveland for the period since June 30, 1939, and that the lawfulness of Hope's rate is an important factor in the case. Since the enactment of the 1938 Natural Gas Act this Commission has had exclusive jurisdiction to determine the lawfulness of the interstate wholesale rates charged by Hope and other natural gas companies.

In response to the request of the city of Cleveland, the Commission will make the appropriate findings of fact as to the lawfulness of the rates charged East Ohio by Hope since June 30, 1939. The Interstate Commerce Commission has furnished precedents for the performance of this public duty. Congress intended that this Commission cooperate with state Commissions and municipalities, and the provisions of §§ 5(b) and 17 are special evidence of such intent."

Extract from opinion in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591 (decided January 3, 1944), pp. 618-619:

"*Findings as to the Lawfulness of Past Rates.* As we have noted, the Commission made certain findings as to the lawfulness of past rates which Hope had charged its interstate customers. Those findings were made on the complaint of the City of Cleveland and in aid of state regulation. It is conceded that under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those 'to be thereafter observed and in force.' § 5(a). But the Commission maintains that it has the power to make findings as to the lawfulness of past rates even though it has no power to fix those rates. However that may be, we do not think that these findings were reviewable under § 19(b) of the Act. That section gives any party 'aggrieved by an order' of the Commission a review 'of such order' in the circuit court of appeals for

the circuit where the natural gas company is located or has its principal place of business or in the United States Court of Appeals for the District of Columbia. We do not think that the findings in question fall within that category.

The Court recently summarized the various types of administrative action or determination reviewable as orders under the Urgent Deficiencies Act of October 22, 1913, 28 U. S. C. §§ 45, 47a, and kindred statutory provisions. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125. It was there pointed out that where 'the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action,' it is not reviewable. *Id.*, p. 130. The Court said, 'In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province.' *Id.*, p. 130. And see *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, 309, 310; *Shannahan* v. *United States*, 303 U. S. 596. These considerations are apposite here. The Commission has no authority to enforce these findings. They are 'the exercise solely of the function of investigation.' *United States* v. *Los Angeles & Salt Lake R. Co., supra*, p. 310. They are only a preliminary, interim step towards possible future action—action not by the Commission but by wholly independent agencies. The outcome of those proceedings may turn on factors other than these findings. These findings may never result in the respondent feeling the pinch of administrative action."

No. [redacted]77

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]1950

MONTANA-DAKOTA UTILITIES CO.,
a Corporation,
Petitioner,

v.

NORTHWESTERN PUBLIC SERVICE COMPANY,
a Corporation,
Respondent.

BRIEF

Of Respondent, Northwestern Public Service Company, in Opposition to Petition for Writ of Certiorari.

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No. 827.

IN THE

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Respondent.

BRIEF

Of Respondent, Northwestern Public Service Company, in Opposition to Petition for Writ of Certiorari.

OPINIONS BELOW.

The judgment of which petitioner seeks review by certiorari was entered by the United States Court of Appeals for the Eighth Circuit on April 4, 1950 (R. 1996). The opinion is reported in 181 F. 2d 19. That decision reversed the judgment of the United States District Court for the District of South Dakota which was rendered against this respondent on September 15, 1948. The opinion of the trial court on the jurisdictional issue is reported in 73 F. S. 149. The opinion of the trial court on the merits is not reported and is set out in R. 1883-7.

JURISDICTION.

Respondent agrees with petitioner that Title 28 U. S. C., Sec. 1254 confers jurisdiction upon this Court to issue the writ, but denies that similar jurisdiction is conferred by Title 16 U. S. C., Sec. 825p. That section of the Federal Power Act does not apply to the case at bar, as more fully discussed herein (p. 16).

QUESTIONS PRESENTED.

The petition sets out three questions for the consideration of the Court, but fails to identify the basic question which in reality is the only question before this Court: Had the District Court jurisdiction over the action instituted by petitioner against this respondent, or was the Court of Appeals correct in reversing the judgment below for lack of jurisdiction?

STATEMENT.

There were three power properties involved here. They abutted each other in a nearly perpendicular line in the states of North and South Dakota. The predecessors of plaintiff-petitioner, North Dakota Power and Light Company ("North Dakota"), and Northern Power and Light Company ("Northern"), operated the northernmost and middle properties, respectively. The defendant-respondent ("Northwestern") operated the southernmost of the three. Petitioner's predecessors, including Dakota Public Service Company ("Dakota") into which the other two companies were later merged, were owned by one holding company, United Public Utilities Corporation ("UPU"), and respondent was owned indirectly by another holding company, The Middle West Corporation.

At the time these two holding companies came out of separate receiverships in 1935, the three properties were

being operated as a single system by interchange connections arranged prior to, and continued during, the receiverships. Connections and additional facilities for this purpose had been built and paid for by respondent. To facilitate joint operations certain of the key operating personnel were put on the boards of directors of the three companies. For this reason, petitioner claims that the contracts covering the interchange arrangements among the three systems were presumptively fraudulent. In each instance the joint director arrangement was reported to the Federal Power Commission and had its approval. The dominant person in the UPU subsidiaries was Samuel W. White, the chief executive of UPU, and he was never on the board of the respondent, operator of the southern company. The contracts between the companies recording their interchange arrangements and fixing the rates and charges between them were filed with the FPC, and legal rates thus established. The parties operated under these arrangements throughout the ten year period in issue, that is, from September 1, 1935, to October 19, 1945, on which latter date the petitioner purchased from the UPU holding company the stock of Dakota and acquired its properties through liquidation of the company.

Fifteen months later, on February 3, 1948, it brought the present suit against the respondent, allegedly under the Federal Power Act* claiming (a) that the interchange contracts were presumptively fraudulent because petitioner's predecessors had joint directors and officers with the respondent; (b) that the rates provided were unreasonable, and (c) that the contracts were improperly filed. In the present application the petitioner appears to have dropped its complaint about improper or late filings. The petitioner's case here is rested on the alleged presumption of fraud attaching to transactions entered into by companies with joint directorates. The petitioner desires to escape

* Both parties being Delaware corporations, there is no diversity of citizenship (R. 2, 210, 116).

from application of the rules making the filed rate the legal rate, and requiring it or its predecessors to apply for relief to the FPC through the claim that its predecessors were subject to domination by the respondent throughout the ten-year period on account of the joint directorates. It is argued that, by reason of this, petitioner's predecessors were not free agents to decide to apply, or to apply, to the Commission for relief, and hence neither the rule of exclusive jurisdiction nor of prior exhaustion of remedies was binding on them. Thus petitioner, having purchased Dakota from UPU, claims to be entitled as assignee and successor in interest to its predecessors to proceed in the District Court to recover damages it claims they suffered through the ten years involved by overcharges for energy bought and under-payments for energy sold in their interchanges with the respondent. The basis of recovery was a determination by the District Court of the unreasonableness of the rates established in the contracts and filed with the FPC. That judgment was reversed by the Eighth Circuit which held that the trial court lacked jurisdiction over the subject matter.

Some of the factual record constituting the setting in which these claims are laid and which was before the Court of Appeals might be helpful to the Court here, particularly to amplify the statement as to the contracts between the parties.

(1) The first contract in issue is the oral contract of September, 1935, for the interchange of energy between Northern and Northwestern for five mills per kilowatt hour. This rate remained unchanged throughout the ten years in issue (R. 630-1). The energy sold by Northern to Northwestern was surplus energy (R. 1644, 1127, 1499) generated by North Dakota (R. 1080). It was delivered to respondent mostly during off-peak periods while Northwestern furnished energy to the UPU group mostly during peak periods (R. 961, 1723, 1030, 1499).

(2) The second contract is known as the interconnection contract of October 7, 1936 (R. 464-5): In the late twenties Northern needed to fortify and improve its system, which was weak both in generating and transmission facilities (R. 1075, 1083-4, 433, 997-8, 815, 1001, 1034, 1828-9, 1845). Northern being badly in need of cash (R. 1075-6), Northwestern, which was at that time controlled by the same holding company as Northern, built interconnection facilities at no capital or carrying cost to Northern (R. 1497). When, after receivership, UPU emerged as the separate owner of the Northern and North Dakota, the question was presented to UPU whether to build new plants and transmission facilities or to continue to tie-in with respondent on an agreed basis of rates and charges. UPU chose the latter course for its subsidiaries rather than bear the whole brunt of the sizable expenditures which would have been required under the first alternative (R. 1076). Negotiations toward the establishment of a charge for these interconnection facilities were carried out over a long period between Strike, vice president of the three operating companies, and White, first receiver, and later president of UPU (R. 1074-5, 1100, 1020). White sent Lakin, an engineer and president of eleven of the UPU subsidiaries (R. 1604), and later a UPU director (R. 1194), who had no connection with respondent (R. 1604-5) to inspect the properties and determine the advisability of the contract (R. 1113). Upon his recommendation White decided that the contract as to both the charges provided, namely, $20,000 interconnection charge and the five mills energy rate was not only desirable (R. 1128-9, 1610-3) but necessary to Northern (R. 1076). It was also beneficial to North Dakota which could run its low cost power station at Beulah at a high load factor by selling surplus energy to Northwestern (R. 1080, 1005), also increasing the revenue for Knife River Coal Mining Co., the fuel supplying subsidiary of UPU (R. 1067, 1080, 1084-5, 1004). Both Lakin and White advised the UPU board to approve the contract

(R. 1609-14). Similar opinion was expressed by the UPU general counsel, Francis H. Scheetz of the firm of Evans, Bayard & Frick of Philadelphia (R. 1132-3, 1647), who had no connection with respondent or its parent company (R. 1636). The matter was laid twice before the board of UPU (R. 1114-5, 1121-28) and upon its approval White instructed the UPU subsidiaries to execute the contract (R. 1138).

(3) The history of the reserve capacity contract of 1938 shows the same pattern. UPU was faced with the problem of meeting the critical power situation of its subsidiaries (R. 1645). It caused a survey to be made by Sargent and Lundy, a firm of consulting engineers of Chicago, and considered the same, as well as other engineering studies at several meetings (R. 1118-9, 1138-41, 1160-61, 1164-5). The contract which provided for a yearly reserve capacity charge of $13.20 per kw payable to whichever company or companies was or were supplying reserve capacity (R. 54-5), was intended to pool the generating capacities of the UPU and the Northwestern systems, thus making available to the UPU subsidiaries the reserve capacity of Northwestern. After discussion by White with engineers (R. 1177), other officers of UPU, and Scheetz (R. 1178), it was approved by the UPU board (R. 1179-84) and executed by the operating companies in December of 1938.

(4-5) After the merger of Northern and North Dakota into Dakota on July 1, 1939, UPU decided that the interconnection and reserve capacity contracts should be redrafted to reflect the corporate change of its subsidiaries (R. 1652, 1185). Since no changes were made in any of the rates (R. 1189-90, 631, 704-5) Scheetz entrusted the matter to his South Dakota correspondent (R. 1652-3).

(6) Throughout this period there was a steady growth of demand for energy (R. 1879, 891). In 1941 additional generating capacity on the interconnected system was con-

sidered necessary. Northwestern expressed willingness to install additional capacity at Aberdeen at the northern end of its system upon the safeguard that the reserve capacity agreement with Dakota be changed into a ten year contract (R. 1190-92). White made several substantial modifications in the original draft (R. 1219-20) and, after a survey of the properties by both White and Lakin (R. 1194) and advice by Scheetz (R. 1221, 1509, 1645-6, 1654-5), the contract was approved by the UPU board, which recommended it to Dakota (R. 1193, 1614). The contract continued the three rates. On January 28, 1942, White authorized and approved the execution of the contract as of July 1, 1941 (R. 1225, 1221).

(7) Since the war had prevented Northwestern from carrying out the program of increasing its generating capacity, as contemplated by the 1941 contract, Sanborn (then president of Dakota and respondent, and, after petitioner's acquisition of Dakota, still the president of respondent) suggested to White an amendment to change the ten year contract into a cancellable contract (R. 1229-31). His suggestion was accepted, and the contract was finally drafted by the UPU counsel after several changes were made by White (R. 1232-54, 1656, 1858). The UPU board authorized White to recommend the execution of the amendment to Dakota (R. 1255-6, 1615), and the contract was executed on March 13, 1943 (R. 103).

(8-9) The last two contracts in issue are two agreements for allocation of joint management expenses between Northwestern and the UPU subsidiaries, which were dated January 2, 1936, and July 1, 1939, respectively. As receiver first, and as president of UPU later, White, who had terminated six similar arrangements relating to other UPU subsidiaries (R. 1316-19, 1553), decided to and did continue this joint management arrangement until the day UPU sold its Dakota stock to petitioner. He actively par-

ticipated in the drafting and negotiating of these contracts as representative of the UPU subsidiaries (R. 1099, 1384), on whose boards he remained at all times (R. 28-33, 1106). Both of these contracts were approved by the UPU board (R. 1099). The only item challenged by petitioner under these contracts, which cover nine classes of employees, concerns the allocation of the salaries and expenses of load dispatchers (R. 173-186, 1967-71).

These are the contracts in issue. Under the provisions of the Federal Power Act, all of the interchange contracts were filed with the FPC and petitioner's predecessors either participated in the filing or filed a certificate of concurrence in the filed rate under the directions or approval of UPU (R. 267-9, 343-5, 1652, 297-8, 1583, 1224-5). Thus, everybody having a financial interest participated in, or approved of, the filings. The Commission approved all the filings (R. 34, 35, 43, 61, 68, 87, 103, 108-111, 353). The joint management contracts were not formally filed because they did not establish or affect rates and charges for the transmission or sale of electric energy and were not required to be formally filed as such. Their existence and their basic terms, however, were disclosed to the FPC in the applications filed by the joint directors and officers for authority to hold interlocking positions in compliance with the requirements of the Federal Power Act, 16 U. S. C., 825d (R. 330, 339, 353). All these applications were granted by the FPC (R. 359-362).

The joint operating directors were selected and approved by White personally before being elected annually by vote of proxies under instructions of UPU (R. 1096-9, 1319). In his capacity as president and director of UPU and director of the Dakota companies, White was satisfied as to the "ability," "integrity" and "loyalty" of that personnel (R. 1328).

SUMMARY OF THE ARGUMENT.

I.

There is no conflict between the decision of the court below and the decision of the U. S. Circuit Court of Appeals for the Fourth Circuit in **Hope Natural Gas Co. v. Federal Power Commission** (1943), 134 F. (2d) 287, reversed (1944), 320 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281.

II.

The petition, far from tendering a new important question to be settled by this Court, actually attempts to unsettle the doctrines of exclusive jurisdiction of the FPC and of exhaustion of administrative remedies in disregard of unbroken lines of decision of this Court.

1. The Court of Appeals below properly held that the determination of the reasonableness of rates is within the exclusive jurisdiction of the FPC.

2. The alleged lack of administrative remedies, which is disproved by the record, affords no basis for jurisdiction in the District Court.

3. No public interest is involved in the present petition; any recovery by petitioner would be a mere windfall for it, while consumers could receive no possible benefit.

ARGUMENT.

I.

There Is No Conflict Between the Decision of the Court Below and the Decision of the U. S. Circuit Court of Appeals for the Fourth Circuit in Hope Natural Gas Co. v. Federal Power Commission (1943), 134 F. (2d) 287, Reversed (1944), 320 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281.

1. In the first place, inasmuch as the decision of the Circuit Court of Appeals in the **Hope** case and the decision below did not involve the same or similar issues, there would have been no conflict between the two decisions, even if the former one had not been reversed by this Court, which it was. In the **Hope** case, no district court trial was involved and no question of district court jurisdiction was in issue. The case involved an appeal from an FPC rate order; in the Commission proceedings the principal issue was the reasonableness of certain wholesale rates for the future but the Commission also made findings as to the reasonableness of past rates. In so doing, the Commission held that it did not have the power to fix rates for the past or award reparations, but that it did have power to make findings as to the reasonableness of past rates at the request of an interested municipality. 134 F. (2d), l. c. 309. The decision of the Circuit Court of Appeals on this point was summarized in the following words:

> "If it [the Commission] was not given the power to fix past rates, or award reparations based upon their unreasonableness, it certainly was given no power to do the same thing indirectly by making findings of fact as to past rates to be given effect in rate proceed-

ings before state commissions." [134 F. (2d), l. c. 310.]

In the present case, the decision below relates to the jurisdiction of a district court to determine the reasonableness of filed rates. No findings of the FPC as to past rates in aid of a state regulatory commission are in question. In fact, the court below has made no decision, conflicting or otherwise, on any issue involved in the **Hope** case. The only respect in which there is even a superficial resemblance between the issue and decision in the present case and those in the **Hope** case is this: in the course of its discussion as to the lack of jurisdiction of the district court in the present case, the court below (after stating that the rule of primary jurisdiction and the doctrine of legality of filed rates are not affected by petitioner's contentions as to alleged defective filing and alleged fraud) proceeds to say:

> "Jurisdiction in such a controversy as this to investigate fraud practiced by an electric public utility in the past as well as in the present is vested not in the district court, but in the Commission by § 307, 16 U. S. C. A., § 825f, . . . The Commission by § 309 (16 U. S. C. A., § 825h) is empowered to make, amend, and rescind such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions of the Act. The Commission can, no doubt, correct its own mistakes. In case a complainant is aggrieved by the decision of the Commission, its remedy is by appeal under § 313 (b), supra" [R. 1995, 181 F. (2d), l. c. 23].

Even if this statement be regarded as a "decision" of the court below, there quite obviously would be no conflict between such a decision, viz., that the Commission has power to investigate past fraud and correct past mistakes, and a decision that the Commission has no power to make find-

ings as to reasonableness of past rates to be given effect in rate proceedings before state authorities.

The basic holdings of the two courts of appeal as to legality of filed rates were identical;* their conclusions differed only because they were dealing with different issues. The alleged conflict relied on in the petition is thus a synthetic one which could be suggested only through misapprehension of the issues and decisions in the two cases.

2. If there had otherwise been a conflict between any decision of the Circuit Court of Appeals in the **Hope** case and the decision below, that conflict would have disappeared entirely for purposes of the present petition when this Court reversed the judgment of the Circuit Court of Appeals in the **Hope** case.

The reversal, it is to be noted, went specifically to the decision of the Circuit Court of Appeals that the Commission had improperly made findings as to reasonableness of past rates. True, this Court did not itself pass upon the Commission's power to make such findings, but this Court did expressly reverse the Circuit Court's decision on the ground that the findings were not reviewable in any event. After reversal by this Court, the decision of the Circuit Court is neither controlling nor authoritative as a precedent, and, therefore, not a "decision" with which the decision below may be in conflict within the meaning of Rule 38.5 (b) of this Court.

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* Compare the following portions of the respective opinions:

4th Circuit 134 F. (2d), l. c. 311	8th Circuit R. 1995; 181 F. (2d), l. c. 22
"When rates were filed with the Commission pursuant to Section 4 (c) of the Act they became the only lawful rates which the utility could charge or accept. * * * Until changed by the Commission under the power granted pursuant to Section 5 (a) they were binding alike upon the company and its customers * * *"	"The rates filed and approved by the Commission are the lawful rates until changed in the way provided by the Act. * * * So long as the filed rate is not changed in the manner provided by the Act it is to be treated as though it were a statute, binding upon the seller and the purchaser alike."

Freeman on Judgments (5th Ed., 1925), Vol. 3; p. 2416, says: "The judgment reversed becomes mere waste paper * * *." In **Leader et al. v. Apex Hosiery Co.** (C. C. A. 3, 1939), 108 F. (2d) 71, 81, aff'd 310 U. S. 469, 84 L. Ed. 1311, 60 S. Ct. 982, the Circuit Court of Appeals considered the effect of the Supreme Court reversal (302 U. S. 656, 82 L. Ed. 508, 58 S. Ct. 362) of its previous decision in certain injunction proceedings (90 F. [2d] 155) and said:

> "The decree of this court in the injunction proceedings must therefore be considered as having been vacated. It is no longer binding as a precedent, as the law of the case, or as res judicata."

Likewise, in **Crawford v. Metropolitan Life Ins. Co.** (St. Louis Ct. App. 1943), 167 S. W. (2d) 915, 920, the Court stated:

> "The first and foremost contention of appellant is that the suit is barred by the ten year statutes of limitation. * * * That question was before this Court in a very similar case based on this same policy of insurance. * * * Later our opinion was quashed by the Supreme Court. * * * And although it was quashed on another ground than as to the statute of limitations, the effect of the Supreme Court action was to do away entirely with our opinion so that it never became an authority. Hence the question is now again before us for determination, as though neither this Court nor the Supreme Court had ever considered it, and in fact the Supreme Court did not deem it necessary to and did not consider the question of the statute of limitations, as its opinion clearly shows."

To the same effect, see **Keller v. Hall** (C. C. A. 9, 1940), 111 F. (2d) 129, 131; **Kaplan et al. v. Joseph et al.** (C. C. A. 7, 1942), 125 F. (2d) 602, 606, and **Barr et al. v. Sumner et al.** (1915), 183 Ind. 402, 109 N. E. 193.

In any event, even assuming that the Court of Appeals' opinion in the **Hope** case should not be considered a legal nullity insofar as it sets forth grounds of decision which were not expressly reversed by the Supreme Court (the decision itself having been reversed on other grounds), it is clear that such statement of the lower court as to the grounds of the reversed decision is at most an obiter dictum and not a "decision." Cf. **Remick Music Corp. v. Interstate Hotel Co. of Nebraska** (D. C. Neb. 1944), 58 F. S. 523, 542.

As this Court pointed out in **Rogers v. Hill** (1933), 289 U. S. 582, 587, 77 L. Ed. 1385, 53 S. Ct. 731, the words "opinion" and "decision"

> "• • • while often loosely used interchangeably, are not equivalents. The court's decision of a case is its judgment thereon. Its opinion is a statement of the reasons on which the judgment rests [citing cases]. The Judicial Code uses 'decision' as the equivalent of 'judgment' and 'decree'. §§ 128, 238, U. S. C., Title 28, §§ 225, 345."

The same is true of rule 38.5 (b) of this Court, which uses the term "decision" in its technical sense. Compare: **Magnum Import Co. v. De Spoturno Coty** (1923), 262 U. S. 159, 163, 67 L. Ed. 922, 43 S. Ct. 531.

Under no permissible theory can it be said that a conflict exists between the decision below and the "decision" of the Circuit Court of Appeals in the **Hope** case.

II.

The Petition, Far From Tendering a New Important Question to Be Settled by This Court, Actually Attempts to Unsettle the Doctrines of Exclusive Jurisdiction of the FPC and of Exhaustion of Administrative Remedies in Disregard of Unbroken Lines of Decision of This Court.

1. The Court of Appeals below properly held that the determination of the reasonableness of rates is within the exclusive jurisdiction of the FPC.

Petitioner grounds federal jurisdiction on the Judicial Code, 28 U. S. C. 41 (1) (now 28 U. S. C. 1331) and on Section 317 of the Federal Power Act, 16 U. S. C. 825p (Petition, pp. 1-2, 12-13). Both contentions are clearly erroneous.

(a) **As to the Judicial Code.** Petitioner raises the self-defeating question "whether the Power Act divests the District Court" of jurisdiction (Petitioner's Brief, p. 21). It is clear that until the Power Act was enacted, there could be no jurisdiction over claims arising under it. Obviously, the Act which allegedly gave rise to the asserted claim could not also take away a non-existent prior jurisdiction to determine the same. The statute creates new substantive rights* and duties and at the same time defines by whom, and how, and where those rights and duties should be protected and enforced. Petitioner forgets for the moment that federal courts are courts of limited jurisdiction and that since **Turner v. Bank of North**

* No right or remedy to attack public utility wholesale rates fixed by contract on the ground of unreasonableness existed at common law, as petitioner itself admitted in its brief before the Court of Appeals (p. 28). See also **Arkansas Natural Gas Co. v. Arkansas R. R. Commission et al.** (1923), 261 U. S. 379, 67 L. Ed. 705, 43 S. Ct. 387; **Southern Iowa Electric Co. v. City of Chariton, Iowa, et al.** (1921), 255 U. S. 539, 65 L. Ed. 764, 41 S. Ct. 400; **City of Paducah v. Paducah Ry. Co.** (1923), 261 U. S. 267, 67 L. Ed. 647, 43 S. Ct. 335; **Colorado Power Company v. Halderman et al.** (D. C. Colo., 1924), 295 F. 178.

America (1799), 4 Dall 8, 11, 1 L. Ed. 718, a presumption obtains that a cause is not within their jurisdiction until the contrary appears.

If any new or additional rights were created by the Power Act in favor of petitioner or its predecessors, those rights, and any corresponding duties on the part of respondent, are to be measured according to the standards provided by the Act itself, and adjudicated and enforced under the procedural mechanism there established. The Court of Appeals below correctly held, "Nowhere does the Act give the district court power to determine just and reasonable rates; that power is given to the Commission exclusively" (R. 1992; 181 F. [2d], l. c. 22). Section 41 (1) of the Judicial Code cannot be resorted to as a detour to avoid the application of those standards, to circumvent the exclusive jurisdiction of the FPC and the statutory method whereby its orders are reviewable in the Courts of Appeals.

(b) **As to the Power Act.** Petitioner attempts here to find a basis for jurisdiction in the District Court by isolating a particular section of the Act (Section 317, 16 U. S. C. 825p)* from its context in the statute so as to give it a new and unsupportable meaning and function. The real meaning and function of the section, entirely different from those attributed to it by petitioner, are clear enough when the statute is viewed in its entirety.

In the Power Act Congress created a comprehensive scheme of regulation of interstate utility companies **through the instrumentality of the Federal Power Commission.** The interstate facilities of such companies are expressly committed to the jurisdiction of the Commission,

* That section, so heavily relied upon in the Petition, was neither pleaded in the complaint as amended nor relied upon by the District Court, which ruled that "While the Power Act does not specifically authorize such a suit * * * the Court * * * is vested with the necessary authority, as well as the duty to entertain such suit, by implication" (R. 113).

and each of the sections of the Act dealing with a particular aspect of utility regulation refers to the Commission as the agency of Congress to effectuate the purposes of the Act. The filing and other administrative provisions of the Act are closely tied in with the provisions establishing the standard of reasonableness, and all aspects are referred to the exclusive jurisdiction of the Commission. As part of the same pattern the Commission is given various types of enforcement powers in cooperation with the Attorney General. 16 U. S. C. 825 e, f, g, m, n. Insofar as the Commission may seek enforcement through criminal actions or other judicial proceedings, jurisdiction over such proceedings (not suits between power companies over claims for damages because of alleged unreasonablenes of filed rates or alleged fraud) is vested exclusively in the District Courts. 16 U. S. C. 825p.

Judicial review of orders of the FPC under the Power Act is conferred on the U. S. Courts of Appeals. 16 U. S. C. 825l. This means of review is exclusive. **Federal Power Commission v. Pacific Power & Light Co.** (1939), 307 U. S. 156, 160, 83 L. Ed. 1180, 1183, 59 S. Ct. 766; **Switchmen's Union of N. A. et al. v. National Mediation Board et al.** (1943), 320 U. S. 297, 88 L. Ed. 61, 64, 64 S. Ct. 95; **Safe Harbor Water Power Corp. v. Federal Power Commission** (C. C. A. 3, 1941), 124 F. 2d 800, cert. den. (1942), 316 U. S. 663, 86 L. Ed. 1740. But again prior resort to the Commission is a condition precedent for judicial review. Section 825l (a) provides:

> "No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon." [1]

[1] This requirement is jurisdictional. **Federal Power Commission v. Metropolitan Edison Co. et al.** (1938), 304 U. S. 375, 82 L. Ed. 1408, 58 S. Ct. 963.

To follow out petitioner's assertion (Petition, pp. 2, 7, 13; Brief, p. 22) that Section 825p, Title 16 U. S. C., confers "exclusive jurisdiction" upon the **District Court** to entertain actions based on alleged violations of the statutory requirement that rates shall be reasonable, without prior resort to the Commission, would mean to thwart the whole scheme of administrative machinery and procedural requirements, and the limitations which the statute establishes. It would mean to take away the exclusive jurisdiction of the FPC over the reasonableness of rates and to transfer that jurisdiction to the 87 District Courts. Petitioner has not cited a single case which even inferentially supports this construction of Section 825p of the Power Act, or the parallel Section 717u of the Natural Gas Act.

Section 825p refers only to the enforcement of the Act by the Commission, as the Eighth Circuit properly held. If it were intended to cover suits by private parties, its language would not be limited to cases where no administrative remedy is available—as contended here by petitioner—but would include all cases. In such event, the Commission would be deprived of its primary function; the carefully limited jurisdiction of the Court of Appeals on orders of the Commission would become meaningless; and a new system of administration and enforcement of the Act at the hands of the District Courts would nullify and replace the whole scheme of the Act.

Its legislative history makes it perfectly clear that such construction of Section 825p must be rejected. As originally introduced, the Senate and House bills (S. 1725 and H. R. 5423, 74th Congress) each contained a reparations provision taken in substance from the Interstate Commerce Act, providing that (a) the Commission could order reparations for past payments of unreasonable rates, on complaints filed within two years after payment, and (b)

if the utility did not comply, **action could be brought on the Commission's order in a court of competent jurisdiction.** However, the entire reparation provision was eliminated because not deemed applicable to wholesale transactions. Where Congress has thus **considered and rejected** a provision conferring **jurisdiction on the courts with respect to past payments,*** and then only to enforce Commission determinations as to unreasonableness of past rates, how can an even broader jurisdiction be deemed to have been established by another Section—825p—of the same statute? Petitioner contends that Congress' underlying assumption "has not been justified" (Petitioner's Brief, p. 29), but that is obviously for Congress to consider. It does not warrant judicial adoption of a proposal rejected by the legislative branch.

We submit that Congress has said, as plainly as if it used the very words: "The standards set forth in paragraphs (a) and (b) of Section 824d are to be realized exclusively through the agency named and the procedures detailed in paragraphs (c), (d) and (e) of Section 824d and in Section 824e."

Indeed, this Court has precisely so concluded under the comparable Natural Gas Act. In **Illinois Natural Gas Co. v. Central Illinois Public Service Co.** (1942), 314 U. S. 498, 506, 86 L. Ed. 371, 376, 62 S. Ct. 384, this Court said that the underlying purpose of that Act was to provide

> "* * * through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate * * *."

In **Federal Power Commission v. Hope Natural Gas Co.** (1944), 320 U. S. 591, 617, 88 L. Ed. 333, 353, 64 S. Ct. 281, this Court stated:

* In its summary of the legislative history, petitioner significantly overlooks this essential provision of the original bills (Petition, pp. 11-12, 23).

> "Congress has entrusted the administration of the Act to the Commission not to the courts."

As Mr. Justice Jackson observed in his separate opinion in that case:

> "To carry this into techniques of inquiry is the task of the Commissioner rather than of the judge, and it certainly is no task to be solved by mere bookkeeping, but requires the best economic talent available" (320 U. S., l. c. 653).

In **Colorado Interstate Gas Co. v. Federal Power Commission** (1945), 324 U. S. 581, 589, 89 L. Ed. 1206, 65 S. Ct. 829, a proceeding involving the same Natural Gas Act, this Court said:

> "Rate-making is essentially a legislative function. Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77. Congress to be sure has provided for judicial review of the Commission's orders. Sect. 19, 15 U. S. C. A., Sec. 717r; 4 F. C. A. Title 15, Sect. 717r. But that review is limited to keeping the Commission within the bounds which Congress has created."

Likewise in **Federal Power Commission v. Pacific Power & Light Co.**, supra, this Court stated:

> "A federal court cannot fix rates * * *" (307 U. S., l. c. 160).

There is nothing unique or anomalous about the statute thus construed; it is merely a Congressional restatement of a rule of law which would apply even apart from the statute—the rule of exclusive jurisdiction, which removes from the jurisdiction of the courts (except within the limited area of permissible review) all questions involving reasonableness of rates and other technical matters for the regulation of which an administrative agency has been created.

This rule was first established in **Texas and Pacific Railway Co. v. Abilene Cotton Oil Co.** (1907), 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, and has been consistently reasserted through the years down to the latest decisions of this Court. Thus, in **United States v. Jones** (1949), 336 U. S. 641, 93 L. Ed. 938, 69 S. Ct. 787, reh. den. 337 U. S. 920, 93 L. Ed. 1729, 69 S. Ct. 1150, this Court stated that the District Court properly made "no attempt to render a money judgment for the carrier" (the very thing done by the District Court in the case at bar), and added:

> "Necessarily this restraint reflected the jurisdictional limitations placed upon the court by the Urgent Deficiencies Act. But those limitations themselves reflected another policy, quite apart from and in addition to that giving effect to the constitutional limitations of Article III. The limitations exemplify settled congressional policy concerning the relations of rate-making bodies and reviewing courts. Not only is rate-making essentially legislative in the first instance. **The policy of judicial restraint is one having regard for the expertise of special agencies charged with performing the rate-making function and for the inherent actual, as well as legal, disability of courts to execute that function.** Such doctrines or policies as those of 'primary jurisdiction' and exhaustion of administrative remedies lie at the very root of the problem" (l. c. 652). (Emphasis added.)

While the merits are not before this Court, it may be appropriate to point out that the basic errors made by the District Court in dealing with the technical problems of utility rate-making in this very case sufficiently demonstrate the soundness of the primary jurisdiction rule as embodied in the Federal Power Act. For example, the District Court was evidently unaware of the significance

of the differences between incremental cost and average cost of energy, between "graveyard" or other surplus energy and firm energy, and between peak power and off-peak power. It apparently was not familiar with the theory and practice of power pool arrangements or of the significance and importance of reserve capacity in an electric system. It seemingly failed to grasp the significance of energy interchange in the operations of respondent and petitioner's predecessors. These matters are all grist in the Commission's mill and they are basic to any determination of reasonableness of rates in the present case. In the words of the **Jones** opinion, quoted supra, the District Court was under an "actual, as well as legal, disability" in dealing with them.

As a corollary of the rule so frequently stated by this Court requiring the determination of the reasonableness of rates to be made by the specially qualified administrative agency created by Congress to deal with this specialized field, it is settled that the filed rate is the only legal rate. The District Court erred in holding it could be disregarded.*

As pointed out in the statement, supra, each of the interchange contracts was filed with the FPC as specifically required by law,** and plaintiff's predecessors either joined or concurred in the filings. Also as above noted,

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* Texas and Pac. Ry. Co. v. Abilene Cotton Oil Co., supra; Robinson v. Baltimore & Ohio R. Co. (1912), 222 U. S. 506, 56 L. Ed. 288, 32 S. Ct. 114; Mitchell Coal Co. v. Pennsylvania R. Co. (1913), 230 U. S. 247, 57 L. Ed. 1472, 33 S. Ct. 916; Louisville & N. R. Co. v. Maxwell (1915), 237 U. S. 94, 59 L. Ed. 853, 35 S. Ct. 494; United States v. Interstate Commerce Commission, 337 U. S. 426, 93 L. Ed. 1451, 69 S. Ct. 1410; Backus-Brooks Co. v. Northern Pac. Ry. Co. (C. C. A. 8, 1927), 21 F. 2d 4, cert. den. (1927), 275 U. S. 562, 72 L. Ed. 427, 48 S. Ct. 120; Woodrich et al. v. Northern Pac. Ry. Co. (C. C. A. 8, 1934), 71 F. 2d 732, 736; Watab Paper Co. v. Northern Pac. Ry. Co. (C. C. A. 8, 1946), 154 F. 2d 436; Mississippi Power & Light Co. v. Memphis Natural Gas Co. (C. C. A. 5, 1947), 162 F. 2d 388, cert. den. 332 U. S. 770, 92 L. Ed. 355, 68 S. Ct. 82.

** In view of the requirements of the statute and of the FPC regulations, it is a peculiar statement for petitioner to say that "after the Power Act took effect August 26, 1935, the parties adopted the practice of filing these contracts with the Commission to disclose the rates and charges" (Petition, p. 4; our emphasis).

UPU, plaintiff's vendor and the sole stockholder of plaintiff's predecessors, directed or approved the filings. Under the foregoing authorities the rates and charges in all the contracts were the only legal rates, and so remained, because they were never changed by the FPC.

2. The alleged lack of administrative remedies, which is disproved by the record, affords no basis for jurisdiction in the District Court.

Petitioner's effort focuses on the proposition that no administrative remedy was available to its predecessors because of their alleged domination by respondent, and that therefore there must be jurisdiction on the part of the District Court to entertain this action, otherwise petitioner's right would fail for lack of any remedy (Petition, pp. 14-5, 22, 26, 31). This contention was most strenuously but unsuccessfully urged by petitioner before the Court of Appeals both in its brief and in the oral argument. It is erroneous in fact as well as in law.

(a) In the first place, the complaint below as amended did not plead that petitioner's predecessors were prevented from resorting to the administrative remedies provided by the Power Act because of the alleged domination and fraud of respondent. Being a prerequisite to the jurisdiction of the District Court—as petitioner seems to claim (Petition, p. 14, Question 3)—that allegation should have been pleaded. Nor is there any finding or holding by the District Court that the statutory administrative remedies were unavailable to petitioner's predecessors by reason of the alleged domination of respondent. Petitioner boldly asserts:

> "For the purposes of this petition this Court has to assume that the evidence established and the District Court was justified in finding * * * that the petitioner's predecessor corporations were under the com-

plete domination of the defendant, and that it was by means of that domination that there was no opportunity to apply to the Commission under Section 824d (e) of the Power Act for preventive relief to prevent the unreasonable rates from going into effect" (Petitioner's brief, p. 22).*

Significantly enough, no record reference is furnished by petitioner. Indeed, there were no such findings by the District Court.

Petitioner's statement is also unsound in law. The judgment of the District Court was rendered after trial on the merits, and, after it was reversed by the Court of Appeals, the findings of the District Court are not conclusive on this Court. A presumption of correctness attaches to the decision of the Court of Appeals, and as this Court held in **Reinman v. City of Little Rock et al.** (1915), 237 U. S. 171, 180, 59 L. Ed. 900, 905, 35 S. Ct. 511,

> "If the record, including the opinion, leaves it a matter of doubtful inference upon what basis of fact the state court rested its decision of the Federal question, it seems to us very plain, upon general principles, that we ought to assume, so far as the state of the record permits, that it adopted such a basis of fact as would most clearly sustain its judgment."

Failure to apply the foregoing rules and principles would necessitate an examination into the factual issues of fraud tendered by the petitioner in the District Court and urged in the Court of Appeals. And this the writ of certiorari was not designed to do. The rule is generally asserted by this Court that certiorari does not issue to review facts. **General Talking Pictures Corp. v. Western Electric Co.**

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* See also the even stronger—and equally wrong—statement in the Petition, p. 14, question 3, asserting the existence of

> "* * * facts alleged and found by the District Court—viz., that the plaintiff's predecessors were helpless because of the domination over them by the defendant as a result of which the preventive remedy under 824d (e) was lost * * *."

(1938), 304 U. S. 175, 178, 82 L. Ed. 1273, 58 S. Ct. 849; Frankfurter and Landis, The Business of the Supreme Court (1928), p. 290.

(b) In any event the record clearly shows that there was no "domination" of petitioner's predecessors on the part of respondent or its holding company. Petitioner's repeated charge of "domination" (Petition, pp. 14, 15, 22, 26) is an inflation of the allegations of the complaint and of the findings of the trial court, that the joint officers and directors, or respondent through them, "caused" the predecessors of petitioner to enter into transactions detrimental to them and devised exclusively for the benefit of respondent (e. g., R. 7, 1940).

Yet petitioner does not even claim that White, who at all times was on the boards of the UPU subsidiaries and never on that of respondent, was ever prevented by respondent from resorting to the Commission. The dominant position of White, the chief executive of UPU, in all of the transactions in issue is apparent throughout the record. (See e. g., R. 1111-2, 1318-9, 1866-67, 1838-9; as to his financial interest, R. 1437, 1380 ff.)

Furthermore the undisputed evidence reviewed in the statement, supra, shows that the contracts and rates in issue were all arrived at under the direction or approval of UPU. The joint directors, each of whose applications for interlocking positions was approved by the FPC (R. 359-62),* were elected each year by independent action of the separate stockholders of respondent and of petitioner's predecessors (R. 1096-9). Again, at the hearings held in 1942 by the Securities and Exchange Commission in connection with the integration proceedings against the UPU

* The orders of the FPC contain findings that

"Applicant has made due showing in the form and manner prescribed by this Commission that neither public nor private interests will be adversely affected by his holding the following positions * * * [listing positions]" (R. 360-2).

Nor did FPC question the arrangement at any later time (R. 1510, 1587-8).

under 15 U. S. C. 79k (b) (1) (R. 1487 ff.), Scheetz represented UPU and its subsidiaries (R. 1657). Here the operation of the Dakota system under the 1941 contract, which covered all rates, was fully explored. In answer to the examiner's pointed inquiries the contract was most earnestly defended by UPU in all of its aspects. In so doing UPU again ratified the contract and the three rates provided therein. At those hearings UPU witnesses and its general counsel explained that the joint management followed the policy of referring to the respective companies all matters in which there might be a possible conflict of interests (R. 1542-3, 1545-6).

There is no allegation in the petition herein or in the complaint below, nor is there any finding by the District Court that UPU, as the sole stockholder of petitioner's predecessors, was ever under the domination of respondent for any purpose. The only finding, which has some indirect bearing on the point, is the one that "Middle West"—not respondent—had "actual control" of United Public Service Corporation and through it "potential control" of UPU (R. 1935). That finding was clearly erroneous both in law and in fact. In law, control of UPU by Middle West would not be control by respondent of UPU or of the predecessors of petitioner, and the finding was erroneous insofar as it purported to support the judgment against respondent. The act of an agent may legally become the act of his principal, but the converse is not true.*

In fact, the undisputed evidence shows that Middle West did not have control of petitioner's predecessors at any time during the period of controversy. From 1935 until July 1, 1945, Middle West could elect only one of the 5 to 7 directors of UPU (R. 233-4, 1349-51, 1088, 1554-5,

* Crosby et al. v. Calaway (1941), 65 Ga. App. 266, 16 S. E. 2d 155, 158; Pfeffer v. Lehmann et al. (1938), 255 App. Div. 220, 7 N. Y. S. 2d 275, 278; Barnett v. Perrine (Tex. Civ. App., 1923), 250 S. W. 1111, 1115; King v. City of Beaumont et al. (D. C. Tex., 1924), 296 F. 531, 534; Kingston Dry Dock Co. v. Lake Champlain Transp. Co. (C. C. A. 2, 1929), 31 F. 2d 265; 3 C. J. S., Agency, p. 130.

343, 356, 1092-3). On July 1, 1945, Middle West became entitled to vote 28% of the stock of UPU, but this was unimportant because, after lengthy negotiations, on the following day UPU contracted to sell Dakota to petitioner (R. 1333-4) and the transfer followed in due course. In any event it will be noted that the last contract in issue was dated March 13, 1943 (R. 103), that is, more than two years prior to the one day 28% "control" of UPU by Middle West.

Thus, there is no evidence establishing "domination" by respondent of either the predecessor operating companies of petitioner or of UPU. It is absolutely undisputed that in the ten year period in issue neither UPU, nor any consumer or state regulatory body or any other person lodged any complaint with the FPC challenging the reasonableness of the rates and charges involved here. Nor did the Commission on its own motion institute any proceeding against this respondent (R. 1588).

(c) Finally, even assuming for the sake of argument that petitioner's factual assertions of "domination" were correct, it is a non-sequitur to claim that the District Court is therefore empowered to determine the reasonableness of the rates in issue. No legal metamorphosis can convert lack of adequate administrative remedy into a source of jurisdiction for the District Courts, particularly when Congress has deliberately withheld from those courts any jurisdiction over reparations (supra, pp. 18, 19). Arguments similar to those of petitioner have been rejected by other courts of appeals. Thus, in **Mississippi Power & Light Co. v. Memphis Natural Gas Co.**, supra, where Mississippi argued that it had been induced by Memphis not to resort to the Commission, the Court said, inter alia:

> "Mississippi argues that since the Commission has held it may not set retroactive rates, to require it to

go before the Commission to obtain lower rates in advance of deliveries, would require it to have instantaneous knowledge of the lower rates extended by Memphis to another customer, and would require the Commission to obtain immediate action. Congress has made certain provisions for these hardships, and supplication for further relief must be addressed to that body" (162 F. 2d, l. c. 391).

Similarly, in **Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co. et al.** (C. A. 1949), 173 F. 2d 784, the Sixth Circuit rejected the contention that a federal court should take jurisdiction upon an allegation by plaintiff that the FPC has no authority to grant the relief prayed. Likewise in **Backus-Brooks Co. v. Northern Pac. Ry. Co. et al.**, supra, charges of domination and unfaithfulness of the directors were held of no avail to confer jurisdiction upon the district court.

The rule clearly applicable to the present case is that stated by Mr. Justice Douglas in **General Committee etc. v. Missouri-Kansas-Texas R. Co. et al.** (1943), 320 U. S. 323, 337-338, 88 L. Ed. 76, 84, 64 S. Ct. 146:

> "In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized * * * **Courts should not rush in where Congress has not chosen to tread.**" (Emphasis supplied.)

Petitioner's ultimate plea that it must have a remedy because it has a "right" is equally fallacious in its major premise, namely, that it has an **existing right.** The prede-

cessors of petitioner and respondent took the only means authorized by law to establish legal rates for electric power at wholesale moving in commerce, that is, filed their contracts containing the rates with the FPC. Under the law approval of these filings operated to establish the rate as legal and enforceable. The rates thus established continued to be the legal and binding rates by remaining on file through the period involved here. As time moved on these established rates performed their function and no longer had any purpose to serve. The fact that these were the legal rates, binding on all, occurred because the Federal Power Act declared it so. Neither of the contracting parties who had established the rates, or their respective stockholder owners; nor any consumer; nor other person on behalf of consumers, took any action to modify, change or disestablish the rates then in effect. Nor did the Commission do so of its own motion, after inquiry or otherwise (R. 1588). Nor does petitioner challenge here the filing of any of the rates. The attack on the rates is collateral.

What petitioner claims to be its "right" is that of a successor owner to set aside and disestablish the legal rates of those past years, and to collect damages through the establishment by court decree of new rates in their stead. This is the "right" as to which petitioner is claiming there would be no remedy, under the holding of the Court of Appeals. As a newcomer on the scene, petitioner can have no greater "rights" than those of the parties to which it has succeeded. Petitioner's alleged "right" is not a reality.

3. **No public interest is involved in the present petition: any recovery by petitioner would be a mere windfall for it while consumers could receive no possible benefit.**

There is no new issue of federal law of public importance tendered in the petition which would justify the issuance of the writ. As this Court said of the parallel provisions of the Natural Gas Act, which is also administered by the

FPC, "the aim of the Act was to protect ultimate consumers * * *." **Federal Power Commission v. Interstate Natural Gas Co., Inc., et al.** (1949), 336 U. S. 577, 581, 93 L. Ed. 895, 69 S. Ct. 775; see also **Federal Power Commission v. Hope Natural Gas Co.**, supra, 320 U. S., l. c. 610, 612. Obviously, the consumers for the period 1935-1945 would not share in any recovery of petitioner, which is not even purporting to sue in a representative capacity. Nor would any other consumer benefit thereby. This is the position taken by the FPC in its amicus brief and argument before the Court of Appeals, in support of its conclusion that the trial court lacked jurisdiction and that any recovery by petitioner would amount to a mere windfall to it. The FPC is entrusted with the duty of administering and enforcing the Act, and as a Justice of this Court had occasion to state, the Commission "has not been an unzealous guardian of national interest."*

The windfall aspect of this case is particularly striking since all of the matters complained of by petitioner occurred prior to October 19, 1945 and until that day petitioner owned no stock of, nor had any direct or indirect interest in, any of the UPU subsidiaries. Until petitioner entered on the scene, those companies had the burdens and benefits of the contracts in question: their costs of operation, their rates to customers, and their earnings to stockholders—all depended upon the entire set of facts and circumstances as then existing, including the contracts with respondent, and there is no suggestion that their customers paid excessive rates or their stockholders received an inadequate return. When petitioner bought the Dakota stock from UPU, the sale was authorized by the Securities and Exchange Commission (R. 242) and petitioner did not and does not claim that it paid more than a fair price for the utility assets and earning power it was acquiring.

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* Mr. Justice Frankfurter in First Iowa Hydro-Electric Cooperative v. Federal Power Commission (1946), 328 U. S. 152, 187, 90 L. Ed. 1143, 66 S. Ct. 906.

Petitioner tries to reap where its predecessors did not sow. Any recovery in this case would be of no avail to consumers, who are the ultimate beneficiaries of the Act, and therefore no question of public importance is raised by the petition for certiorari. In **Layne Bowler Corp. v. Western Well Works** (1923), 261 U. S. 387, 393, 67 L. Ed. 712, 43 S. Ct. 422, in dismissing a writ of certiorari, this Court stated:

> "* * * it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties * * *."

In conclusion, it is respectfully suggested that the petition for writ of certiorari to the court below should be denied.

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